

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**MASSACHUSETTS EYE AND
EAR INFIRMARY**

AND

**AREA TRADES COUNCIL, A/W IUOE,
LOCAL 877; IBEW, LOCAL 103;
PAINTERS DISTRICT COUNCIL 35;
PLUMBERS UNION, LOCAL 12; NEW
ENGLAND REGIONAL COUNCIL OF
CARPENTERS, LOCAL 51, AFL-CIO**

CASES

1-CA-40064

1-CA-40075

Robert DeBonis Esq. Counsel for the
General Counsel

David M. Mandel Esq., Counsel
For the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. This case was tried in Boston, Massachusetts on November 18, 19 and 20, 2002. The charge in 1-CA-40064 was filed on June 25, 2002 and the charge in 1-CA-40075 was filed on July 1, 2002. A Consolidated Complaint was issued by the Regional Director of Region 1 on September 30, 2002 and alleged as follows:

1. That on or about December 27, 2001, the Respondent interfered with employee Section 7 rights by telling employees that they should keep confidential what had been discussed during an employee's termination interview.

2. That in or about April 2002, the Respondent, unilaterally and without notice to the Union, implemented a new policy whereby represented employees would no longer be paid overtime when providing coverage for evening, night and weekend shifts and that instead, they would be given time off during the same week so that coverage would be provided without using overtime.

Based on the record as a whole, including my observation of the demeanor of the witnesses and after considering the briefs filed by the parties, I hereby make the following:

Findings of Fact

I. Jurisdiction

The Complaint alleges, the Answer admits and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Also it is conceded that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II Alleged Unfair Labor Practices

(a) The Alleged Unilateral Change

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1-CA-40075

The Union was certified on September 11, 2000 and negotiations for a first contract commenced in October 2000. As of the hearing dates, the parties had not reached a contract.

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The bargaining unit consists of about 20 employees who work in the maintenance, plant operations and clinical engineering departments. However, the people involved in this case are the general maintenance mechanics, lead HVAC mechanics and HVAC refrigeration mechanics. And of this group, of which there are about 9 or 10, only 4 to 5 would have been affected. The employees affected would be Scratchrel Daily, Paul McEntee, John Henry Oliver, and Steve Stapleton. A fifth possibly affected was Roman Doglopolov. For the remainder of this decision, I shall refer to them as mechanics.

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The Respondent is a hospital in downtown Boston. From 1995 to June 2001, Richard Congdon was the Director of Facility Services. In October 1999, Christopher Teller was hired as Congdon's assistant and was employed with the title of Manager of Plant Operations and Technical Services. Both of these gentlemen were responsible for supervising various employees including the employees in the categories covered by this case. However, while Teller was there, he was the person immediately responsible for scheduling the work and the overtime of the employees in question.

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On or about June 29, Robert Biggio replaced Congdon and on or about February 25, 2002, Teller left and was replaced on April 16, 2002 by Michael Canning.

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The mechanics are assigned to work on non-biomedical equipment throughout the hospital. Three or four are normally assigned to work during the day from Monday to Friday. One is normally assigned to work Wednesday during the day. Thus, during the week, the normal daytime shift would consist of four mechanics, one of whom would have to have the appropriate license. The minimal weekday daytime shift would consist of three mechanics.

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Additionally, since the hospital is open at all hours and during weekends, there is one person assigned per shift for evenings and nights during the week and for all three weekend shifts. Some of the weekend shifts have, in the past, been assigned to part-time mechanics who may have other jobs elsewhere.

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Obviously, there are times when employees are on vacation or out sick or are otherwise unavailable. When this occurs, the Respondent requires that the shifts to which the mechanics are assigned, be covered by other mechanics. This is typically not much of a problem for the weekday, daytime shifts, as these are normally covered by at least three to four people. It is, however, a problem if coverage is needed for an evening, night or any weekend shift, because each of these shifts are normally covered by only one person. The problem of covering evening, night or weekend shifts also becomes a necessity if an employee normally assigned to such a shift leaves and that job is not filled. In that circumstance, a daytime weekday employee would normally be sought to fill the open shift until a new employee is hired.

There are therefore, three situations when a day shift, weekday mechanic is required to work on another shift. One, when the normally scheduled mechanic is out sick. Two, when a

regularly scheduled mechanic for an off shift is on vacation. Three, when an evening, night or weekend shift becomes vacant because the person who is normally assigned, leaves the job for one reason or another and no replacement is immediately hired.

5 When an evening, night or weekend shift is open, the Respondent *must* cover that shift with another mechanic. On this there is no discretion. And except in the rarest of circumstances, the pool of mechanics that are used to do this coverage would be the weekday, day-time mechanics. If such a mechanic was asked to and accepted the extra shift, this would result in him working overtime inasmuch as the additional shift would be hours in excess of the 40 hours per week that he is normally assigned to work. However, if the mechanic opted, or 10 the company forced him to reduce his normal week assignment by an equivalent number of hours, then his total hours would not likely exceed 40 during the week in question and therefore, he would not be paid overtime for that week. In that circumstance, he would, in effect, be taking compensatory time to balance for covering the open evening, night or weekend shift that 15 he worked.

The Respondent asserts that it was its policy, over many years, for managers to weigh a matrix of factors to decide whether to have mechanics work uncovered shifts during any given week, either as overtime or as compensatory time. According to Congdon, among the factors 20 were the budget, (how much over or under the department was in terms of the budgeted overtime costs); staffing requirements, (i.e. how the coverage assignment would affect the normal week day requirement to have sufficient mechanics to do what was necessary); morale, (allowing for more overtime would be good for morale); and the availability of capital projects which could be used to justify overtime by pushing those costs out of the operations budget. 25 According to Congdon, the departmental manager was supposed to weigh these various competing factors each time he needed to fill an open evening, night or weekend shift before determining if the employee(s) would be permitted to work that shift in addition to his normal forty hour schedule, (thereby resulting in overtime); or by requiring an employee to delete a shift from his normal schedule so that the Company would not incur an overtime expense. That is, 30 according to Congdon, the policy was to exercise discretion on a case by case basis, as each situation arose.

In contradiction, Paul McEntee testified that over the 12 years that he worked as a mechanic, the actual practice was that when he or other mechanics were asked to work 35 evening, night or weekend shifts, the choice of which weekday, daytime employee would do that would be determined by a rotation system and that the decision as to whether that employee was going to work the additional shift as overtime or alternatively take off an equivalent number of hours, (compensatory time), was a decision left completely to the employees themselves. In this regard, he indicated that there was only one exception to this procedure which was that in 40 the case of a mechanic named Leonard Bodden, who each year took a four week vacation, Congdon requested the other mechanics to take at least some part of the covered shifts as compensatory and not overtime. (Congdon essentially confirmed that this was a request, albeit he opined that although he did this as a request, his intention was to require it as an order).

45 For the period from October 1999 to February 2002, Teller was Congdon's assistant and he was the person delegated the responsibility of covering open evening, night and weekend shifts when they became open either because of illness, vacation or vacancy. And despite the contention of the Respondent and the testimony of Congdon, Teller's testimony was that he left it up to the mechanics themselves to determine if they were going to work on an overtime or compensatory time basis when they were asked to and agreed to work shifts outside their

normally assigned 40 hour week. ¹ No doubt he did so because it was an easy and effective way to deal with the problem and let him deal with other issues that required his attention. So for the period of time that Teller was involved in this process, the evidence shows that instead of weighing all of the various factors described by Congdon every time that he needed a mechanic to cover an open evening, night or weekend shift, he left it to the employees to work this out amongst themselves and so long as he had coverage for the open shift, he didn't worry about whether this cost too much in overtime pay. In effect, this was a self regulated system established by the employees, with the acquiescence of the relevant management and it continued until changed in 2002.

Thus, according to Teller and McEntee, any written policy ² requiring management to approve all requests for overtime, simply did not apply as a matter of practice for those situations where the Company needed someone to cover an evening, night or weekend shift and asked one of the regular mechanics to cover such a shift in addition to his regular 40 hour weekday schedule. Indeed, it probably was assumed by all, that if a mechanic was asked to cover such a shift, approval was implicitly granted by the requester unless specifically told *not* to work on one of his regularly scheduled week day shifts.

Shortly after Biggio was hired, he met with Teller in July 2001 and told him that the hospital had to be more careful about enforcing its policy that overtime had to be approved by management. And in August 2001, he met with employees in the department and notified them that overtime had to be approved by management. He responded to employee concerns by telling them that it was not his intent to eliminate all overtime. In this context, there was no discussion of overtime vs. compensatory time for situations where employees were asked to cover open shifts.

Despite the meeting in August, the situation did not change and things went along as before. At Biggio's request, Teller drafted a memorandum dated September 18, 2001 that was distributed to the employees. This stated:

Effective immediately, all necessary overtime is to be approved in advance by the Director, Bob Biggio or Chris Teller, Manager Plant Operations.

This applies to situations such as, i.e. overtime for maintenance repairs, shift coverage, maintenance project work, renovation and construction projects, or any other special work assignments.

¹ The only other exception that either McEntee or Teller could recall was when McEntee worked three straight shifts and Teller, concerned for McEntee's health, told him to go home.

² Written policies contained in a Human Resource Manual should not be confused with a document that would be equivalent to a contract. Section 4.03 provides that employees may not work hours beyond their regular schedule without prior approval and requires approval in order to take compensatory time off. Section 4.05 provides that work schedules be determined and arranged by managers based on departmental needs and subject to the discretion of the Employer. The Clinical and Plant Engineering Department has had, at least, since June 1996, a policy requiring that all time off requests be submitted to and approved, in advance. But none of these written policies contradict the practice described by Teller that during the period of time when he was responsible for scheduling the shifts. Thus, there is nothing in these documents which requires a mechanic who is assigned to work an open shift to affirmatively make arrangements to swap one of his regularly scheduled shifts with someone else so as to avoid working more than his usual 40 hour week.

5 When you believe overtime is necessary please contact first, Chris Teller.... If he is not available please contact Bob Biggio.... If the situation is involving a building emergency and both of us are found to be not available, please use common sense to ensure that the interests of the Infirmary are properly met.

10 Notwithstanding the September 18 memorandum, both Teller and the employees understood that it was intended to cover situations such as punching in early but was not intended to and did not impact on the practice of employees opting to take overtime when asked to cover open evening, night or weekend shifts. That is, even though the memorandum mentioned shift coverage, it was not applied so as to require mechanics to reduce their normal schedules when asked to work an open shift. Thus, Teller testified that he always approved shift coverage even if it meant overtime because he had to have shift coverage. He testified that he continued that practice even after the September 18 memorandum because there
15 always was the need to cover a shift and he would not deny overtime to anyone who chose to cover a shift on an overtime basis.

20 On or about November 19, 2001, Bodden went on sick leave and thereafter died. On December 5, 2001, Ron Dunn, who worked a daytime shift from Wednesday through Sunday, was suspended and thereafter discharged. These two partings therefore required that their shifts be covered by the existing employees and this generated more than the usual amount of overtime.

25 In January 2002, Biggio told Teller that he was to inform the employees that they no longer could work overtime for shift coverage and that they would have to swap shifts instead. Nevertheless, according to Teller, he did not require the mechanics to take compensatory time instead of overtime when working open shifts. Thus, even if the employees were told of this policy by Teller in January 2002, the fact is that it was not enforced by him and the employee had no reason at that time to conclude that there was a change in policy. (Actions speak
30 louder than words).

35 For a number of reasons, Teller left and was replaced by Michael Canning in early April 2002. Soon after he arrived, Canning told the employees that they no longer would be allowed to receive overtime for covering open weekday evening shifts and would instead have to swap shifts. However, on April 8, Ken Nash, who had been a part-time weekend employee, was scheduled to work full-time on the weekday evening shift and accordingly, less coverage was required. Accordingly, whatever Canning had told employees, no longer had any impact because they were not needed to cover that shift. Employees who covered open weekend shifts continued to receive overtime.
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According to McEntee, in early May 2002, Biggio told him that the Hospital no longer would pay overtime for covering weekend shifts. On May 20, 2002, the Union sent a letter stating:

45 It's come to my attention that you have informed the maintenance staff of a change in your departmental policy concerning overtime. I am officially protesting this unilateral action on your part.

I understand you announced that in the interests of limiting overtime expense, those employees scheduled to cover a vacant shift would be required to take a day off during the week, thus working that coverage shift on straight time. Since work hours and overtime rules are a mandatory item of bargaining and

this is a change in your current policy, I am requesting that you do not implement this policy until we have had the opportunity to bargain over it.

On June 3, 2002, the Hospital's attorney responded to the Union's letter of May 20. He
5 stated:

Your letter proceeds on a misperception of the facts. It has not been the past practice that employees assigned to cover a vacant shift have always worked that vacant shift on an overtime basis. On the contrary, employees in
10 the past have, on numerous occasions, been assigned to cover vacant shifts by readjusting the employee's schedule so that the work was accomplished within a 40-hour/week schedule, with the consequence being that what you described as the "coverage shift" was worked on a straight-time basis.

In light of this past practice, the recent assignment of some "coverage shifts" on a straight-time basis was not a change in the existing terms and conditions of employment and accordingly there was no obligation to bargain about it with the Union.
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On the other hand, if the Union has concerns in this area which it would like to discuss with the Infirmary, the Union of course is free to do so as part of our overall negotiations for a contract provision concerning overtime.
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Because the hospital fired another of the mechanics, (Charles Reid), in May 2002, this created the need to cover an additional five shifts per week. When the mechanics asked Biggio how they were going to cover all of the vacant shifts, Biggio said that it would not be reasonable to expect the mechanics to do so without getting overtime. And so, the practice went back to what it had been before.
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Apparently unsatisfied with going back and forth on this issue, the Respondent finally took the bull by the horns, and in late June, 2002, Canning told the mechanics that without prior approval, there no longer would be overtime for covering open shifts; that from now on, they would have to use compensatory time when they did so. The Respondent does not really dispute this and although asserting that its managers have approved overtime on occasions
30 when mechanics have been asked to and worked open shifts, it does acknowledge that this would be the exception and not the rule. The Union was not given advance notice of this action.
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In my opinion, the evidence establishes that there was a change in a fairly long standing practice and that although this change seems to have been accomplished in fits and starts over an extended period of time from January 2002 to June 2002, it was finally accomplished with certainty in late June when the Company decided and implemented a practice of requiring, unless otherwise approved, that the weekday, day time mechanics use compensatory time instead of overtime in situations where they were assigned to cover open evening, night or weekend shifts. Thus, I am persuaded that by June 2002, the Company's had changed the
40 pre-existing practice of allowing these mechanics to decide for themselves whether they could take time off from their normal schedules or receive overtime for such shift coverage.³ From
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³ The Employer offered evidence to show that prior to Teller, there were times when the Company restricted overtime for shift coverage. For example, it presented a June 3, 1994 memorandum to support this contention. But the problem is that during the 2 year period when
Continued

June 2002 onwards, the policy entailed the presumption that a mechanic who worked such an extra shift would be required, unless authorized to the contrary, to eliminate from his normal 40 hour shift, an equivalent number of hours so that overtime would be eliminated.

5 I have no quarrel with this policy, which is designed to contain costs. (In fact, my sympathies would be to favor it). However, it is not my function to say whether this change was good, bad or indifferent insofar as it impacted on the company or its employees. Moreover, the payroll records indicate that the change in policy did not eliminate all overtime for the day time, week day mechanics. There continued to be occasions when these mechanics received
10 overtime when they covered open evening, night and weekend shifts. But the point is that this required prior approval and the procedure no longer allowed the mechanics to decide for themselves whether to do the open shifts on an overtime or compensatory time basis.

15 The issue here is not about the merits of the change. The issue is whether or not a company having an obligation to bargain with a union on behalf of the employees affected by a change, must first bargain with the Union before making the change. And in this connection the NLRA imposes such an obligation where, as here, the change is material and directly affects the wage rates and the hours of its employees. *NLRB v. Katz*, 369 U.S. 742 (1962); *Blue Circle Cement Co.*, 319 NLRB 954 (1995); *Carbonex Coal Company*, 262 NLRB 1306, 1313 (1982).

20 Accordingly, in this respect, I conclude that the Respondent has violated Section 8(a)(1) & (5) of the Act by unilaterally, and without affording the Union an opportunity to bargain, changed a practice of at least 2 years duration of permitting mechanics employed in the bargaining unit, to choose to work overtime or compensatory time when covering evening, night
25 or weekend shifts.⁴

(b) The Alleged 8(a)(1) Violation

1-CA-40064

30 The Complaint alleges that on December 27, 2001, the Respondent interfered with employee Section 7 rights by telling employees that they should keep "confidential" what had been discussed during an employee's termination interview.

35 On December 3, 2001, Biggio heard from Teller about an incident involving one of the mechanics, Ronald Dunn. This involved questions about Dunn's whereabouts during his shift.

40 On December 5, 2001, Biggio held a meeting with Dunn wherein he asked Dunn to explain what had happened. Present at the meeting was another mechanic named Walter Dyer who acted as Dunn's representative. Biggio credibly testified that at the conclusion of the meeting, he and Teller said that they would keep the discussion and any investigation confidential but if Dunn wanted to discuss the matter with any of the other employees, he could do so. There is no dispute that Biggio did not tell Dyer or Dunn to keep anything that occurred at this meeting confidential. Later in the day, Biggio gave Dunn a written notice that he was
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Teller was in charge, his practice was to allow the employees to choose whether to receive overtime or compensatory time when assigned to work shifts that needed to be covered.

⁴ The Respondent contends that this theory was not presented by the Complaint and that the Complaint only alleged that the Respondent unilaterally eliminated overtime for working open shifts. In my opinion, the Complaint is sufficiently broad to encompass this theory and would not preclude an 8(a)(5) finding on a matter that was fully litigated.

being suspended pending further investigation.

After repeated attempts to reach Dunn, a meeting was finally held on December 27, 2001. At this meeting, Dunn was given some documentation as to the reasons for his discharge and according to Biggio, Dunn expressed concern that his reputation might be hurt if the matter became public. Biggio credibly testified that he told Dunn, in the presence of Dyer and others, that he and the Company would keep the matter confidential.

Walter Dyer testified that at the meeting on December 27, 2001, after Dunn was told of his discharge and just before leaving, Biggio "asked us to keep things confidential that were said there."

With respect to the above, I credit Biggio's account and I think that it is more likely that Dyer misinterpreted what Biggio said and misconstrued his remarks about the Company keeping the matter confidential into a request that Dyer and Dunn keep it confidential.

Therefore I conclude that in this respect, the Complaint should be dismissed.

Conclusions of Law

1. By unilaterally, and without notice or bargaining, changing the practice of permitting employees to choose to work overtime or on compensatory time when they work open shifts, the Respondent has violated Section 8(a)(1)&(5) of the Act.

2. The Respondent has not violated the Act in any other manner encompassed by the Complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have concluded that the Respondent has made a unilateral change with respect to certain aspects of its overtime policy, I shall recommend that it return to its preexisting practice and that it bargain until agreement is reached or until the parties reach a good faith impasse on this subject.

Further, I shall recommend that any employees who were adversely affected by this change be made whole for any loss of wages they may have suffered. Interest on the amounts is to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173, (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Massachusetts Eye & Ear Infirmary, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Refusing to bargain in good faith with Area Trades Council, a/w IUOE, Local 877; IBEW, Local 103; Painters District Council, Local 35; Plumber's Union, Local 12; New England Regional Council of Carpenters, Local 51, AFL-CIO, concerning overtime and compensatory time in relation to shift coverage before making any changes in those terms and conditions of employment.

(b) In any like or related manner interfering with employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain in good faith with the certified collective bargaining representative regarding the change described above.

(b) Make whole any employees affected by the unilateral change in the manner described in the Remedy Section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Boston Massachusetts, copies of the attached notice marked "Appendix." ⁶ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 1, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn

⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

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Raymond P. Green
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Area Trades Council, a/w IUOE, Local 877; IBEW, Local 103; Painters District Council, Local 35; Plumber's Union, Local 12; New England Regional Council of Carpenters, Local 51, AFL-CIO, concerning overtime and compensatory time in relation to shift coverage, before making any changes in those terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL make whole, with interest, any employees who were adversely affected by the aforesaid change.

Massachusetts Eye & Ear Infirmary

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

10 Causeway Street, Boston Federal Building, Room 601, Boston, MA 02222-1072
617 565-6700. Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLAINT OFFICER 617-565-6701